No. 83-1872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SOUTH FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL.,
PETITIONERS,

v.

METROPOLITAN DADE COUNTY, ET AL.,
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

1. Whether a legislative body, after making findings that blacks have been excluded from public contracting opportunities as a result of past racial discrimination, may adopt an administrative procedure under which racial contracting goals and set-asides are recommended to that body for its further consideration.

2. Whether a legislative body, after making such findings, may adopt a racial set-aside and subcontracting goals for a single construction project within a massive public works program.

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INTEREST OF AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of President John F. Kennedy to involve private attorneys in the national effort to assure civil rights to all Americans. Through its national office in Washington, D.C. and its local offices nationwide, the Lawyers' Committee has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in education, employment, voting, housing, municipal services, access to government services, the administration of justice, and law enforcement.

The Lawyers' Committee has previously addressed the issue of race-

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* Letters from counsel for the parties, consenting to the submission of this brief, have been filed with the Clerk.

conscious affirmative action programs in its amicus briefs in DeFunis v. Odegaard, 416 U.S. 312 (1974), Regents of the University of California v. Bakke, 438 U.S. 265 (1978), United Steelworkers v. Weber, 443 U.S. 193 (1979), and Fullilove v. Klutznick, 448 U.S. 448 (1980). The Lawyers' Committee has strongly supported vigorous action by the executive and legislative branches to remedy discrimination and its effects. This Court's decision in Fullilove, upholding legislative power to adopt affirmative action remedies in public construction contracting, has enabled government authorities to increase minority participation in an industry notorious for its history of discrimination. The Lawyers' Committee believes that granting review in the present case would not assist the Court in resolving open questions concerning

affirmative action, because the case involves a routine application of Fullilove to a county legislative body's adoption of affirmative action at a single construction project in a city where blacks have suffered a tragic deprivation of economic opportunity.

STATEMENT OF THE CASE

Petitioners challenge actions taken by the legislative body of Metropolitan Dade County, Florida, after it concluded that existing programs were insufficient to remedy the effects of a long history of public and private discrimination against its black community. The history of those actions was as follows:

The Board of County Commissioners of Metropolitan Dade County (the "County Commission") is the legislative body for the county, empowered by the State of Florida to enact local laws for the general welfare of the county. App. at 47a, 94a.[1] In 1980 violent civil disturbances in Miami brought to the County Commission's attention the gross economic disparities between the black

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[1] The Appendix to the petition is cited herein as "App."

community and the white and Hispanic communities. The County Commission considered the evidence compiled in a series of independent reports, and concluded that past discriminatory practices had impaired the competitive position of businesses owned and controlled by blacks. App. at 54a n.7. It also concluded that, without specific race-conscious measures, black-owned enterprises would not be able to participate significantly in county contracting business. Id. The County Commission therefore enacted Resolution No. R-1672-81, adopting in general terms a "policy of developing programs and measures to alleviate the problem of lack of participation of Blacks in the County's economic life and to stimulate the local Black economy, including specific race conscious measures." Id.

This Resolution was enacted in November 1981, but had no direct effect without further action by the County Commission. App. at 56a.

The United States Commission on Civil Rights issued a lengthy report on Miami in June 1982. App. at 50a n.6. It documented the effects of unlawful public and private discrimination on Miami's black community, and concluded that blacks "as individuals and as a community have been excluded from the economic mainstream in Miami." U.S. Comm'n on Civil Rights, Confronting Racial Isolation in Miami 18 (1982). Among the causes identified were Dade County's unlawful dual school system, remnants of which still persist in the inner city, id. at 27, 34; present and past discrimination against black entrepreneurs, id. at 79-81; intentional discrimination

by both public and private employers against blacks, id. at 124-26; and racial discrimination in the building trades by unions and public licensing authorities, id. at 136. The report specifically criticized the "minimal involvement" of black businesses in construction of Dade County's rapid transit system, the very program involved in this case. Id. at 117-23. Finally, the report emphasized that existing affirmative action programs were inadequate to restore equal economic opportunity to the black community, in part because of Dade County's unusual ethnic situation: the county has a large Hispanic community that has shared successfully in its economic growth, but applicable guidelines direct affirmative action toward minorities in general

rather than targeting it toward blacks in particular. Id. at 180-90.

The County Commission adopted the U.S. Commission's report as part of the legislative findings underlying its two subsequent enactments. App. at 62a, 63a n.8, 72a n.11.

The County Commission enacted Ordinance No. 82-67 (which petitioners call the "race conscious ordinance") in July 1982. App. at 61a. The Ordinance, together with regulations issued under it, establishes an administrative procedure by which county administrators submit to the County Commission recommendations for the adoption of racial goals or set-asides for county construction projects. App. at 62a-67a & nn. 8 & 9. On each county construction project, the responsible department is to recommend whether (and if so, which)

race-conscious measures should be implemented. A three-member contract review committee scrutinizes each proposal, and submits a final recommendation to the County Commission. Any goals recommended must "relate to the potential availability of Black-owned firms in the required field of expertise." App. at 67a & n.9. Set-asides may be recommended only where at least three black prime contractors are available to perform the contract.[2] Id. No contractor can receive more than one set-aside at a time or more than three set-asides within a year. Id. Once the recommendation passes the

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[2] Before the County Commission enacted this procedure, the county manager consulted with the administrator of the Urban Mass Transportation Administration. The County tailored its procedure to ensure consistency with federal regulations imposing affirmative action on federally-assisted mass transit construction, including the Dade County rapid transit project. App. at 61a, 67a; see 49 C.F.R. Part 23.

contract review committee, it is submitted to the County Commission for its consideration. The County Commission must enact each goal or set-aside individually, after finding that the measure is in the best interest of the county and voting by a two-thirds margin to waive the normal bidding procedure. Id; App. at 72a n.11. The County Manager is required to report annually on the percentage of county business awarded to black contractors, and the County Commission is to review annually the need for continued submission of recommendations for goals and set-asides. App. at 63a n.8.

The County Commission enacted a single racial set-aside and goal in October 1982. App. at 71a. It designated the Earlington Heights rapid transit station, the last remaining unbid

site on a twenty-station construction project, as set aside for bidding by black prime contractors. Id. The station was a $6 million project, constituting less than one percent of the county's annual contracting expenditures, and slightly more than one-half of one percent of the total rapid transit project. App. 18a & n.13. The County Commission also imposed a fifty-percent black subcontracting goal for the station. Id. Resolution No. R-1350-82, enacting the set-aside, incorporated and adopted as the County Commission's legislative findings the findings and reports described above. App. at 72a n.11. The County Commission specifically found that the black business community "cannot be expected to receive any significant amount of the public funds to be expended on this contract in the absence of such

race conscious measures." Id. The Resolution also adopted the Contract Review Committee's findings that there were sufficiently many black contractors available to compete effectively for the contract and to perform the construction. App. at 71a, 72a n.11. The resolution was enacted by the two-thirds vote required under the county charter for waiver of formal bidding. App. at 72a n.11.

Petitioners, a group of contractor trade associations, filed suit in November 1982 to enjoin the implementation of any race-conscious bidding procedure on the Earlington Heights project. App. at 44a. The United States District Court for the Southern District of Florida enjoined the prime contractor set-aside, but permitted the county to enforce the subcontracting goals. App.

at 110a-111a, 114a-115a. On appeal and cross-appeal, the United States Court of Appeals for the Eleventh Circuit upheld the County Commission's actions in their entirety, both facially and as applied to the Earlington Heights project. App. at 20a. The court of appeals denied petitioners' request for en banc consideration, without any circuit judge voting for rehearing. App. at 36a.

REASONS FOR DENYING THE WRIT

There is no reason for the Court to disturb the unanimous judgment of the court of appeals upholding this minor and unobjectionable instance of affirmative action in public contracting. The severe economic deprivation of Dade County's black community, and its long history of subjection to public and private racial discrimination amply justify the county legislative body's decision to adopt race-conscious contracting procedures for a single rapid transit construction project.

No more is involved in this litigation. Contrary to petitioners' urgings, Dade County has created no program of racial set-asides and goals, unlimited in time and quantity. The "race conscious ordinance" petitioners challenge is merely an elaborate administrative procedure for generating recommendations

for future legislative action. The only racial set-aside or goal actually evidenced in the record is the Earlington Heights project. As the court of appeals found, that single set-aside is well within constitutional limits in all respects.

The Lawyers' Committee believes that the writ should be denied because: (1) the case simply does not present the broad issues that petitioners describe, concerning "unlimited" goals or set-asides; (2) the decision upholding the County Commission's set-aside of the Earlington Heights station conflicts with no precedent of this Court or of the courts of appeals; (3) petitioners' attacks on the "competence" of the County Commission present issues purely of state law; and (4) petitioners' challenge to the necessity for adopting the set-aside and goals is a factual dispute not warranting review.

I. THIS CASE DOES NOT INVOLVE, AS PETITIONERS CLAIM, UNLIMITED IMPOSITION OF GOALS AND SET-ASIDES, BUT RATHER ONLY A LEGISLATIVE ADOPTION OF GOALS AND A SET-ASIDE FOR A SINGLE CONSTRUCTION PROJECT.

Petitioners purport to challenge Ordinance No. 82-67 not only as applied to the Earlington Heights construction project, but also on its face. They characterize it in their petition as an ordinance that the county government has enacted to authorize itself to impose race-conscious measures in "any (and every) county construction contract." Petition at (i). In fact the Ordinance does no such thing.

Even petitioners recognize that Ordinance No. 82-67 itself imposes no goals or set-asides. It merely sets up an administrative procedure by which proposals for goals or set-asides may be generated within county departments, administratively reviewed, and then

submitted to the County Commission for its consideration. Nor did the County Commission somehow "authorize" itself through the Ordinance to impose race-conscious award procedures -- the County Commission is a legislative body, and its authority to require contracting goals or set-asides is wholly independent of the enactment of a prior ordinance. Ordinance No. 82-67 is merely a procedural device for generating recommendations for future county legislation, and future set-asides (if any) can occur only after further legislative consideration and action.

The only race-conscious contracting procedures presented in this case are the goals and set-aside on the Earlington Heights project. The Resolution creating the goals and set-aside was a discrete legislative action targeting a minuscule

portion of the county's contracting business for black contractors for a limited period of time: the time it would take to award and construct the Earlington Heights station. No other goal or set-aside is before this Court.

Petitioners thus err when they attempt to measure Ordinance No. 82-67 "on its face" against standards derived from this Court's decision in Fullilove v. Klutznick, 448 U.S. 448 (1980). That decision involved federal legislation actually imposing minority set-asides and delegating authority to administrators to decide whether set-asides should be enforced or waived. The federal statute created racial set-asides without any further intervention of the legislature. Accordingly, this Court concerned itself with the lifespan of the legislation, the substantive limits placed on administrative

action, and the nature of the administrative procedures employed in implementing the statute.

The Dade County Ordinance, in contrast, generates only recommendations for legislative consideration. It does not bind the County Commission to adopt or reject the recommendations; indeed, in American jurisprudence legislative bodies cannot commit themselves to future legislation. Glidden Co. v. Zdanok, 370 U.S. 530, 534 (1962); Toomer v. Witsell, 334 U.S. 385, 393 n.7 (1948); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810).

The constitutional challenge to Ordinance No. 82-67 "on its face" is therefore frivolous. The Federal Constitution does not dictate procedures that must be followed in the exercise of legislative power by the States. Townsend v. Yeomans, 301 U.S. 441, 451-52 (1937) (Hughes, C.J.); Bi-Metallic

Investment Co. v. State Board of Equalization, 239 U.S. 441, 445 (1915) (Holmes, J.); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130 (1810) (Marshall, C.J.); see City of Eastlake v. Forest City Enterprises, Inc. 426 U.S. 668, 676-77 (1976) (Burger, C.J.). The Ordinance itself affects no rights, and a challenge to conceivable future legislation would be speculative and premature. Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 230 (1908) (Holmes, J.) ("they should make sure that the state, in its final legislative action, would not respect what they think their rights to be, before resorting to the courts of the United States"); Rescue Army v. Municipal Court, 331 U.S. 549 (1947).

The only constitutional question truly presented on the present record is whether the legislative designation of

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The only constitutional question truly presented on the present record is whether the legislative designation of

the Earlington Heights project for goals and set-asides, in the context of the County Commission's prior resolutions, ordinances, and findings, violated the Fourteenth Amendment.

II. THE JUDGMENT BELOW IS WHOLLY CONSISTENT WITH THE DECISION OF THE OTHER COURTS OF APPEALS AND OF THIS COURT.

There is no conflict to be resolved by this Court. Regardless of how the County Commission's actions are characterized, the court of appeals judgment upholding them is consistent with every decision of the courts of appeals and this Court in similar or related cases.

The legality of government contracting set-asides in the construction industry is hardly a novel issue. The Eleventh Circuit's decision joins precedents of this Court[3] and the courts of

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[3] Fullilove v. Klutznick, 448 U.S. 448 (1980).

appeals for the First,[4] Second,[5] Third,[6] Sixth,[7] and Ninth[8] Circuits approving such programs on the federal, state, and local level. As this Court observed in United Steelworkers v. Weber, 443 U.S. 193, 198 n.1 (1979), "[j]udicial findings of exclusion from crafts on racial

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[4] Associated General Contractors of Massachusetts, Inc., v. Altshuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974).

[5] Local Union No. 35 v. City of Hartford, 625 F.2d 416 (2d Cir. 1980), cert. denied, 453 U.S. 913 (1981).

[6] Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971).

[7] Ohio General Contractors Association v. Keip, 713 F.2d 167 (6th Cir. 1983).

[8] Schmidt v. Oakland Unified School District, 662 F.2d 550 (9th Cir. 1981), vacated on other grounds, 457 U.S. 594 (1982). This Court remanded the case for resolution of a possibility dispositive state law issue. No further opinions have been reported.

grounds are so numerous as to make such exclusion a proper subject for judicial notice." Congress has made comprehensive findings based on numerous studies describing the past discrimination in the construction industry nationwide and the resulting barriers to minority business participation in the construction industry. See Fullilove v. Klutznick, 448 U.S. 465-67 (opinion of Burger, C.J.); 448 U.S. at 520 (opinion of Marshall, J.). Those findings were supplemented, with specific reference to Dade County, by a series of local studies and a report of the United States Commission on Civil Rights, all cited and incorporated in the County Commission's Resolution adopting the Earlington Heights set-aside. See pages 6 to 9 supra. Both the district court and the court of appeals examined these studies and concluded that they

amply supported the County Commission's determination that race-conscious contracting measures were necessary. App. at 95a; App. at 12a-13a.

Petitioners wrongly describe the Dade County contracting policy as based solely on findings of "societal discrimination." Petition at (i). The findings adopted by the County Commission demonstrate that past intentional discrimination by the county itself and by the city of Miami contributed to the current educational and economic deprivations of Dade County's black citizens. Although the County Commission's actions could be sufficiently justified as an exercise of its general legislative powers to remedy the effects of private and "societal" discrimination within the county, in fact their justification is far stronger.

Petitioners purport to find a conflict between the judgment below and

this Court's decision in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), on the supposition that a duly constituted county legislature is "on the low end of the scale" when it comes to judicial deference. Petition at 16. In fact, Justice Powell's opinion in Bakke turned on the distinction between a limited-purpose administrative body like a university board of regents and legislative or administrative bodies empowered to identify and remedy discrimination. 438 U.S. at 301, 309-10.

Since both courts below have determined that the legislative body for Dade County is so empowered under Florida law, it is fully entitled to the deference this Court has always afforded to state lawmaking bodies. State and local governments, no less than Congress itself, are authorized to redress public

and private discrimination. See, e.g., Washington v. Seattle School District No. 1, 458 U.S. 457; United Jewish Organizations v. Carey, 430 U.S. 144 (1977); Ohio General Contractors Association v. Keip, 713 F.2d 167, 172 (6th Cir. 1983).[9]

Finally, the judgment of the court of appeals is consistent with both the holding and the reasoning of Fullilove v. Klutznick, 448 U.S. 448 (1980), upholding Congress' own contractor set-aside program. The evidence of prior discrimination in Dade County is overwhelming and the resulting need for remedial

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[9] Nothing in this Court's decision in Firefighters Local Union No. 1784 v. Stotts, ___ U.S. ___ (Nos. 82-206 & 82-229) (June 12, 1984) is relevant to the issues in this case. The Court expressly disclaimed any attempt to state limits on the authority of a municipal government to engage in affirmative action. Opinion of the Court at 20.

action is severe. Race-neutral remedies had been tried without success. The designation of a single rapid transit station within a twenty-station project, constituting less than 1% of the county's annual contracting business, has negligible impact on the other contractors. App. at 18a-19a. The openness of the legislative process, the necessity for individual consideration and action by the County Commission on every goal or set-aside proposal, and the requirement for annual review of the need for race-conscious measures, all guarantee that the rights of the majority will not be infringed by heavy-handed bureaucrats.[10]

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[10] Petitioners' complaints concerning the absence of administrative procedures for waivers or for challenging "unjust" participation are irrelevant because each goal or set-aside is individually adopted by legislative action, and majority

(footnote continues)

Indeed, Dade County's requirement of legislative action by two-thirds vote on every individual goal or set-aside renders the procedure far more protective of majority rights than any affirmative action program previously examined by the courts.

III. THE "COMPETENCE" OF THE DADE COUNTY COMMISSION IS AN ISSUE OF STATE LAW NOT WARRANTING THIS COURT'S REVIEW.

Petitioners persist in attacking the legislative "competence" of the County Commission to adopt affirmative action measures. This argument raises no substantial federal question, and is undeserving of this Court's attention.

(footnote continued)

contractors have full opportunity to address themselves to the County Commission. As the court of appeals observed, the County Commission's determinations "adequately provided the same safeguard as a formal waiver provision." App. at 20a.

This Court's decision in Bakke makes clear that the constitutionality of a state body's racial remedial action depends on whether state law grants that body power to identify and redress discrimination. 438 U.S. at 309-10 (opinion of Powell, J.). This point of federal law is settled, and the courts below expressed no doubt on the subject. See App. at 11a; App. at 94a.

The only remaining question is petitioners' dispute with the courts over the nature of the legislative powers conferred on the County Commission under Florida law. The district court, closely acquainted with Florida law, concluded that Fla. Stat. §125.01 and the special home rule provisions of Fla. Const. Art. VIII, §6, empowered the County Commission as a duly constituted legislative body to act for the general welfare by identifying

and remedying racial discrimination in the county. App. at 93a-94a. The court of appeals agreed. App. at 11a-12a. Determining the scope of the County Commission's powers is purely an issue of state law. There is simply no reason for this Court to concern itself with this state law issue. See, e.g., Butner v. United States, 440 U.S. 48, 57-58 (1979); Bishop v. Wood, 426 U.S. 341, 345-47 (1976); Wolf v. Weinstein, 372 U.S. 633, 636 (1963).

IV. QUANTITATIVE ANALYSIS OF THE NEED FOR THE EARLINGTON HEIGHTS SET-ASIDE AND GOALS IS AN ISSUE OF FACT NOT WARRANTING THIS COURT'S REVIEW.

Petitioners dispute the evidentiary basis for the County Commission's determinations, with which both the district court and the court of appeals were in complete agreement, that Dade County blacks had been excluded from County

contracting business as a result of discrimination and that race-conscious measures were necessary to increase black participation.[11] They ask this Court to grant review in order to reverse these determinations of fact.

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[11] Petitioners misstate the record when they argue that the County Commission's findings were based solely on statistical disparities. Petition at 17-19. The record of deliberate public and private discrimination reported by the United States Commission on Civil Rights (and adopted by the County Commission) utterly refutes this notion. But their disregard for this history of discrimination goes even further when they insist that affirmative action is not justified above the 1% level represented by the proportion of black contractors already existing in the county. Petition at 22-23. Holding affirmative action down to that level would merely ensure that majority contractors continue to enjoy the advantages resulting from the county's legacy of racial discrimination. The goal of affirmative action in contracting is to increase minorities' participation in industries from which they have been excluded by discriminatory practices. See Fullilove, 448 U.S. at 513-14 (Powell, J., concurring).

These arguments are simply not worthy of the Court's attention. "[T]his Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." Rogers v. Lodge, 458 U.S. 613, 623 (1982) (upholding findings of deliberate discrimination in county's design of at-large voting system); Branti v. Finkel, 445 U.S. 507, 512 n.6 (1980); Graver Manufacturing Co. v. Linde Co., 336 U.S. 271, 275 (1949).

Petitioners' argument also constitutes a frontal attack on the findings made by Congress on the same subject and upheld by this Court in Fullilove v. Klutznick, 448 U.S. 448 (1980). The pervasiveness of past discrimination in the construction industry has necessitated imposition of minority contracting goals on the Dade County rapid transit project under the auspices of the Urban Mass Transportation

Administration and the Department of Labor. See App. at 58a.[12] Petitioners' insistence that there has been no evidence of discrimination ignores the explicit findings of the United States Congress before this Court in Fullilove as well as those of the U.S. Commission on Civil Rights and the Dade County Commission. Petitioners cannot make any showing that would justify reversing these findings.

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[12] The remedial impact of even this limited federal program in the black community has been diluted by the heavy participation of Hispanic contractors, also eligible as minority business enterprises. U.S. Comm'n on Civil Rights, Confronting Racial Isolation In Miami, 117-23 (1982). It was against this background that the County Commission found it necessary to set aside the Earlington Heights contract specifically for blacks.

CONCLUSION

For the foregoing reasons, the petition does not present any question warranting this Court's review, and the Writ of Certiorari should be denied.

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